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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JEREMY STANFIELD, ROMONIA PERSAND, and SHABNAM SHEILA DEHDASHTIAN, individually, on behalf of all others similarly situated, and on behalf of the general public,

Plaintiffs,

v.

FIRST NLC FINANCIAL SERVICES, LLC, and DOES 1 through 50, inclusive,

Defendants.

Case No. C 06-3892 SBA

REPLY TO DEFENDANT FIRST NLC FINANCIAL SERVICES, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST NLC'S PROPOSED NOTICE TO THE CLASS

Plaintiff submits this brief only to rebut inaccuracies in Defendant's "Memorandum of Points and Authorities" relating to Defendant's proposed sentence at page 3, lines 9-12. Plaintiffs do not believe further briefing is necessary as to the remaining three sentences still in dispute.

1. Defendant's Proposed Sentence at page 3, lines 9-12:

On Page 3, lines 9-12, Defendant requests the following language:

> "Should the lawsuit not succeed, however, any person who joined the lawsuit may be collectively and/or proportionately liable to reimburse First NLC for its costs of suit – such as filing fees or deposition transcripts – and/or First NLC's attorneys' fees."

2. Defendant Would Not Be Entitled to Attorney Fees As a Prevailing Party.

Defendant argues that courts may award attorneys' fees to prevailing defendants in an FLSA action, citing **EEOC v. Complete Dewatering**, 16 F. Supp. 2d 1362, 1368-69 (S.D. Fla. 1998) and **Kreager v. Solomon & Flanagan**, 775 F.2d 1541, 1542-43 (11th Cir. 1985). However, the **Complete Dewatering** decision was **reversed** by the Eleventh Circuit in **EEOC v. Complete Dewatering, Inc**., 281 F.3d 1283 (11th Cir. 2001). Though the Eleventh Circuit did not publish its reversal decision, the parties' briefing makes clear that the attorney fees award was precisely the issue before the Circuit Court. **See**, **e.g.**, 2000 WL 33995369.

Moreover, in **Kreager**, the 1985 decision by the Eleventh Circuit, the Court **remanded** an award by the District Court of attorney fees to Defendant, saying that such would only be appropriate if the plaintiffs had engaged in behavior comparable to that sanctionable under Fed.R.Civ.P. 11, setting forth a 13-factor test of bad faith. **Kreager**, 775 F.2d at 1542. In so doing, the Court expressly noted regarding the FLSA, "Unlike other legislation which authorizes fee awards to prevailing parties, the Fair Labor Standards Act does not specifically provide attorney's fees to prevailing defendants." **Id.** at 1542-1543.

Though Defendant seems to have been searching Florida cases, it failed to cite **Bell v. Mynt Entertainment, LLC**, 223 F.R.D. 680, 683 (S.D. Fla. 2004)(**citing** 29 U.S.C. § 216(b)), a much more recent and comparable case, in which the Court expressly refused to include language in an FLSA notice to class members after conditional certification. In **Bell**, the Court explained:

> Finally, the defendants object to the plaintiffs' proposed notice because it fails to inform potential plaintiffs that they could be liable to the defendants for attorney's fees and costs should the defendants prevail. The FLSA, however, is not a two-way fee-shifting statute. Attorney's fees are awarded to prevailing plaintiffs, but no similar provision is made for prevailing defendants. **See** § 216(b). The plaintiffs therefore will be liable for attorney's fees only where they have " 'acted in bad faith, vexatiously, wantonly or for oppressive reasons.' " **See Kreager v. Solomon & Flanagan, P.A.,** 775 F.2d 1541, 1543 (11th Cir.1985) (**citing Alyeska Pipeline Service Co. v. Wilderness Society**, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141(1975)). The plaintiffs' potential liability for attorney's fees is not as broad as the defendants imply, and I do not believe it is necessary for the court-ordered notice to contain language regarding this potential liability.

Bell, 223 F.R.D. at 683.

The Court here, as in **Bell**, should not acquiesce to Defendant's transparent attempt to scare away plaintiffs with legitimate claims. If, at any time in this litigation, the Court were concerned enough about the conduct of the plaintiffs in the case or the conduct of Plaintiffs' counsel, such that the Court were considering sanctions, then at that juncture the Court could seek to warn the plaintiffs of the possibility of sanctions. Such a warning is unnecessary at this juncture.

3. Plaintiffs Would Not Be Liable for Costs Should They Not Prevail.

Defendant cites Fed. Rule Civ. Proc. 54(d) and **Rodriguez v. Whiting Farms, Inc.,** 360 F.3d 1180, 1190-91 (10th Cir. 2004) for the proposition that the plaintiffs may individually be liable for costs of suit, including deposition transcripts, in the event that Defendant prevails. However, **Rodriguez** does not address the instant case, in which Plaintiffs' counsel has agreed to absorb all costs unless and until Plaintiffs achieve successful resolution through judgment or settlement. Nor does **Rodriguez** address the issue of of whether such costs are even recoverable in light of the FLSA's limitation on the collective of fees and costs to the prevailing employees only (see, 29 U.S.C. § 216(b)), thereby negating Rule 54(d) which states that costs are recoverable "except when express provision therefore is made…in a statute of the United States." Since Defendant is unable to provide 9th Circuit authority on this issue, it should not be allowed to

insert this language that is designed merely to threaten potential plaintiffs.

For the foregoing reasons, Defendant's proposed sentence at page 3, lines 9-12 of Defendant's proposed notice should be stricken.

Dated this 22nd day of November, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd of November, 2006, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF Systems for filing and served a copy U.S. Mail postage prepaid to:

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